Tan Pak v Cham Boon San and other actions

HIGH COURT (MUAR) — CIVIL SUIT NOS 226 OF 1984, 22–39 OF 1986, 22–24 OF 1988, 22–27 OF 1988 AND 22–28 OF 1988
RICHARD TALALLA JC
3 MARCH 1991

Civil Procedure *— Adjournment — Application for adjournment — Judicial discretion — Action set down for trial — Judicial time affected — Letter informing court that counsel engaged in murder trial — No objection by other parties — Application not to be treated in cavalier manner — Formal application to be made — Grounds of application — Professionalism of counsel's conduct*

Legal Profession *— Professional conduct — Counsel undertaking to appear in another case when otherwise engaged for trial — Application of counsel for adjournment of trial by letter — Whether application an abuse of court's process — Whether amounts to contempt of court*

Five actions, the first of which was commenced in 1984, were consolidated into three which were to be heard together. Between October 1988 and January 1990 the evidence of several witnesses were recorded. The case was fixed for trial on 23 April 1990. On 23 April 1990 the case was adjourned on the application of the plaintiffs. The actions were finally fixed for hearing in March 1991 after yet another adjournment. By letter dated 20 February 1991 the solicitor for the first defendant applied for a further adjournment on the ground that he was engaged in a murder trial in the High Court at Johore Bahru at the time. Counsel for the other parties had no objection to the application.

Held, allowing the application:

(1) Judicial time was at a premium, and counsel should be sensitive to applications which made inroads into judicial time. Once a case was set down for hearing there should be no adjournment thereof except for just cause, usually emanating from circumstances beyond control.

(2) It was unprofessional for counsel to undertake to appear in a case when reasonably he should know that he could not do so. If in consequence the case had to be adjourned it would be an abuse of the court's process which he would have been privy to and that might well be prima facie a contempt of court inasmuch as it affected the fair administration of justice.

(3) An application for adjournment of a hearing or trial was one which should be treated no less seriously or informally than any other interlocutory application calling for the application of the judicial mind and exercise of judicial discretion. Counsel should appear on the hearing date and formally apply for an order for adjournment.

(4) The fact that there was no objection by any other party to these actions to the application for adjournment was not conclusive. The applicant had to look to the court for indulgence which meant a sacrifice of judicial time and the time of the attendant court staff, disruption of the list and compounding the backlog of cases.

(5) Upon due consideration of all the facts and circumstances of the case, knowing that without the services of experienced counsel concerned the client would suffer, and seeing that counsel for the other parties had no objection, the application was allowed.

[Bahasa Malaysia summary

Lima tindakan, yang mana tindakan yang pertama telah dimulakan pada tahun 1984, telah dijadikan tiga yang telah dibicarakan bersama. Antara Oktober 1988 dan Januari 1990 keterangan beberapa saksi telah direkodkan. Kes itu telah ditetapkan untuk perbicaraan pada 23 April 1990. Pada 23 April 1990 kes itu telah ditangguhkan atas permohonan plaintif. Tindakan-tindakan itu akhirnya telah ditetapkan untuk perbicaraan pada Mac 1991 selepas satu lagi penangguhan. Dengan satu surat bertarikh 20 Februari 1991 peguam bagi defendan pertama telah memohon penangguhan selanjutnya atas alasan bahawa beliau sibuk di dalam suatu perbicaraan pembunuhan di Mahkamah Tinggi di Johor Bahru pada masa itu. Peguam bagi pihak-pihak yang lain tidak membantah permohonan itu.

Diputuskan, membenarkan permohonan itu:

(1) Masa kehakiman adalah diutamakan, dan peguam seharusnya peka terhadap permohonan yang banyak menghabiskan masa kehakiman. Sebaik sahaja sesuatu kes ditetapkan untuk perbicaraan seharusnya tidak ada penangguhannya kecuali sebab yang berpatutan, biasanya berpunca daripada keadaan yang di luar kawalan.

(2) Adalah tidak profesional bagi peguam untuk berjanji akan hadir di dalam sesuatu kes sedangkan mengikut budi bicara dia seharusnya tahu yang dia tidak boleh berbuat begitu. Jika akibatnya kes itu hendaklah ditangguhkan akan terjadi penyalahgunaan proses mahkamah yang mana dia bersubahat dan boleh jadi adalah prima facie suatu penghinaan mahkamah oleh sebab ia menyentuh pelaksanaan keadilan yang berpatutan.

(3) Suatu permohonan untuk penangguhan pembicaraan atau perbicaraan harus diperlakukan tidak kurang serius atau secara tidak formal berbanding dengan sebarang permohonan interlokutori yang lain memerlukan pemakaian fikiran kehakiman dan penggunaan budi bicara kehakiman. Peguam harus hadir pada hari pembicaraan dan secara formal memohon perintah untuk penangguhan.

(4) Fakta bahawa tiada bantahan yang dibuat oleh sebarang pihak yang lain dalam tindakan-tindakan ini terhadap permohonan untuk penangguhan bukanlah tidak dapat dipertikaikan. Pemohon ter-

paksa mengharapkan mahkamah untuk menurut kemahuannya yang bererti suatu pengorbanan masa kehakiman dan masa kakitangan mahkamah yang menguruskan kes itu, menyebabkan gangguan senarai itu dan menjadikan lebih buruk lantukan kes.

(5) Atas pertimbangan yang sewajarnya semua fakta dan keadaan kes ini, ketahuan yang tanpa perkhidmatan peguam berpengalaman berkenaan klien itu akan terjejas, dan kelihatan bahawa peguam bagi pihak-pihak yang lain tiada bantahan, permohonan itu dibenarkan.]

Notes

For cases on adjournment, see 2 *Mallal's Digest* (4th Ed) paras 76–79 and 2342–2343.

Cases referred to

1 *Maxwell v Keun & Ors* [1928] 1 KB 645 (refd)
2 *Lee Ah Tee v Ong Tiow Pheng & Ors* [1984] 1 MLJ 107 (folld)
3 *Priddle v Fisher & Sons* [1968] 3 All ER 506; [1968] 1 WLR 1478 (refd)

Rugber Singh (*Rugber Singh & Partners*) for the plaintiffs.

Humfrey Ball (*Humfrey Ball*) for the defendant in C/S No 226–84 and for the first defendant in C/S Nos 22–39–86, 22–24–88, 22–27–88 and 22–28–88.

Daniel Tay Choon Beng (*Tay Kuan Teck & Sons*) for the second defendant in C/S Nos 22–27–88 and 22–28–88.

YY Yong (*YY Yong & Associates*) for the second defendant in C/S Nos 22–39–86, 22–24–88 and for the third defendant in C/S Nos 22–27–88 and 22–28–88.

Cur Adv Vult

Richard Talalla JC: There are five actions, the first commenced in 1984, the second in 1986 and the remaining three in 1988, which are before me this 3 March 1991 for hearing. The progress of these actions, I should say the lack of it, is lamentable. I shall trace their history.

By order of court made on 21 July 1988 the second and third actions were consolidated as were the fourth and fifth actions. Thus there were a pair of consolidated actions ('the consolidated actions'). At the same time and in the same order of court it was ordered that the evidence of three witnesses of advanced age be taken de bene esse, the reason being ominously obvious.

On 25 October 1988 in the consolidated actions the evidence of the first of the three witnesses was so taken before the learned senior assistant registrar and the consolidated actions adjourned to the 6, 7 and 8 March 1989 for the remaining evidence to be taken. However on 18 January 1989 the hearing on 6, 7 and 8 March 1989 was adjourned at the instance of the court, there being no judge available to hear the cases, and instead set down for hearing on 19 July 1989.

When the consolidated actions came on for hearing on the date last mentioned they were adjourned on the application of counsel for the plaintiffs on the ground that he was proceeding to the United Kingdom to live for an indefinite period. The consolidated actions were then adjourned and set down for hearing on 11 September 1989.

When the consolidated actions came up for hearing on the date last referred to, it was agreed that the evidence of the two remaining witnesses would be taken on 19 November 1989.

On 19 November 1989 the evidence of these two witnesses was taken by me, the evidence of the third witness being taken only in part. The consolidated actions were then adjourned to 16 January 1990 when the rest of the evidence of the third witness was taken before me and the actions adjourned to 23 April 1990 for trial.

On 23 April 1990 counsel for the plaintiffs, who had yet to proceed to the United Kingdom, appeared and submitted that new solicitors and counsel were to be appointed to act for the common plaintiffs in the consolidated actions which were then adjourned to 13 August 1990 for trial.

Meanwhile on 7 June 1990 the learned senior assistant registrar issued a letter in the first action asking the parties to show cause on 8 July 1990 before me why the matter should not be struck out for want of prosecution, as nothing eventful was happening.

On 8 July 1990, only counsel for the defendant [in C/S No 226–84] appeared in answer to the registrar's request to show cause. That action was then adjourned to 13 August 1990 after the court indicated that it should be heard together with the consolidated actions.

On 6 August 1990 the solicitors for the plaintiffs, newly appointed, by letter of that date addressed to the learned senior assistant registrar applied for an adjournment of the hearing on 13 August 1990 on the ground that senior counsel had been retained to lead counsel for the plaintiffs but unfortunately senior counsel was not available to appear at the appointed hearing on 13 August 1990. That application by letter after due consideration by me was refused and at the same time it was indicated that counsel should make formal application for adjournment on the appointed date, that is 13 August 1990.

On 13 August 1990 senior counsel appeared and formally applied for an adjournment, essentially on the ground that there was insufficient time between his being retained and the hearing date for him to prepare the case for the plaintiffs. The application was argued thoroughly and the appropriate case law cited to wit *Maxwell v Keun & Ors*[1] and *Lee Ah Tee v Ong Tiow Pheng & Ors.*[2] The application for adjournment was not opposed. Counsel for the plaintiffs argued that the primary consideration in the application for adjournment was the interest of justice — justice between all parties and that I should exercise my discretion judicially and to do that I had to consider all the facts and circumstances. I did precisely that and found that if I granted the application the defendants would not be affected in any serious manner except in regard to costs thrown away. Accordingly I granted the adjournment and made an appropriate order in regard to the costs thrown away and with the consent of all counsel present adjourned

A the consolidated actions and the first action which it was generally agreed should be heard together with the consolidated actions, to 2, 3 and 4 March 1991 for hearing.

By letter dated 20 February 1991 which was received in the registry of this court on 25 February the practitioner for the first defendant in the
B consolidated actions applied for an adjournment of the hearing commencing yesterday on the grounds that he had to appear as counsel in a murder trial in the High Court, Johore Bahru which was to commence the day before. That letter was brought to my immediate attention and on my direction the learned senior assistant registrar telephoned the office of the solicitor and informed the solicitor's representative, the solicitor being
C absent at the time, that the application for adjournment was refused, inter alia, on grounds summarized as follows:

(a) It was not made known to this court whether the other parties to the action were consenting to the application for adjournment.

(b) It was not proper for counsel, except for good reason, to accept a brief
D in the other case seeing that the trial dates of the two cases clashed. No reason was furnished for counsel putting himself in the predicament of being committed to appear at the same time in two cases at different places.

(c) It was not made known to this court when counsel received the brief to act in the criminal case and whether the brief was assigned by the court
E or whether he was privately retained.

(d) It was not made known to this court whether or not one or other of the two cases could have been briefed out to other counsel, thus enabling both matters to go on for hearing as scheduled and obviating the necessity of making this application to adjourn.

F When the matters came on for hearing yesterday counsel seeking the adjournment was absent. The actions were adjourned to today because the annual general meeting of the Johore Bar Committee was then taking place and by arrangement with YAA Chief Justice counsel belonging to the Johore Bar were excused from attending court on that day. Counsel con-
G cerned was from that Bar. When the matter came on this morning, counsel for the second defendant was again absent but counsel who was junior counsel to him but has since been discharged was present to explain the circumstances surrounding senior counsel's absence. The explanation was that senior counsel was unilaterally assigned in the murder case by the senior assistant registrar of the High Court at Johore Bahru by letter dated
H 14 January 1991 which was received by counsel on 29 January 1991.

Experience tells me, and I go back as far as the year 1956, that counsel as a rule are consulted by the senior assistant registrar as to their availability before being assigned to appear for an accused person in an appropriate criminal trial, usually a trial involving a capital charge. That certainly is the
I practice here in the Muar High Court. According to counsel concerned in this case he was not so consulted. That is surprising as it is that the letter dated 14 January from the senior assistant registrar should have been received more than two weeks later, all contributing to the disruption of the hearing of these cases.

Of course an accused person under a capital charge who is without the services of counsel should have available to him by way of assignment the best legal representation available. The question here is that that representation should be efficiently arranged for, which includes taking action at an early stage.

The experience in the High Court of Muar is that the trial of a person charged for murder occupies three to four weeks whilst hearing of a case under s 39B of the Dangerous Drugs Act 1952 generally takes about half that time. The attitude of this court is that the longer the estimated duration of trial the greater the care that should be taken in setting it down for trial. Thus, for example, when the time arrives for fixing the dates of trial of a person committed for the same under a charge of murder our senior assistant registrar or his appointed registry officer, well beforehand, communicates with the deputy public prosecutor, the accused and his counsel, if counsel has been retained, and with the concurrence of all these persons, having advised them to ensure that all witnesses are available and that their respective cases are in all respects ready for trial, sets the case down for trial on dates suitable and agreed to by all the persons concerned. At the same time the parties are advised that no adjournment of the trial will ordinarily be granted unless by reason of circumstances thereafter occurring and beyond the control of the parties. If it is necessary to assign counsel to represent the accused, the senior assistant registrar consults counsel as to counsel's availability and willingness to appear as such and then, and then only, makes the appropriate assignment. It will be seen that with such care taken in setting down the case for hearing the chances of the trial being disrupted, and indeed proceedings in other courts being affected such as has occurred in these proceedings by reason of the murder trial in the High Court of Johore Bahru, are slim.

As I see it, in the face of a serious current backlog of cases, applications for adjournment without just cause, especially late applications for the same, are anathema. Every case adjourned results in one more to the backlog of cases. Speaking for myself and this court and all the subordinate courts under the administrative jurisdiction of this court it is expected that counsel appearing in these courts will co-operate to the fullest to reduce the backlog.

Judicial time is at a premium. Counsel should be sensitive to applications which make inroads into judicial time. Every consideration is given to counsel's requirements and convenience before a case is set down for hearing; for example, time to prepare the case, the marshalling of witnesses, even, when possible, counsel's extra mural commitments, social and domestic. But once a case is set down for hearing there should be no adjournment thereof except for just cause, usually emanating from circumstances beyond control.

An application for the adjournment of a trial or hearing should not be treated in a cavalier manner. It is a serious matter giving rise to serious consequences. Such an application is governed by case law. The leading authority and one which binds me is the Federal Court case of *Lee Ah Tee*.[2] In addition to that there are guidelines provided in Practice Direction No 5 of 1989 entitled 'Practice Direction On Adjournment', dated

A 1 December 1989. It is expressly stated therein that the direction is not intended to abrogate, impose or hold a fetter on the discretion of the trial court to grant an adjournment on any proper ground whether in exercising its powers conferred by statute or its inherent jurisdiction. It is stated in that practice direction by way of example that a ground that counsel is engaged in another court is not a sufficient reason save in altogether exceptional circumstances beyond counsel's control.

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Once again I turn to the experience gathered from sitting in this court for a period nigh on two years now. Letters from solicitors seeking adjournment of hearings and trials are received at the average rate of two to three per week. Most of them have been made only a few days before the appointed hearing, on unacceptable grounds, and accordingly refused. As I understand it, there is no provision in the rules of our court for interlocutory applications to be made by letter. They are usually made by way of summons-in-chambers or orally by counsel in court. An application for adjournment of a hearing or trial, in my view is one which should be treated no less seriously or informally than any other interlocutory application calling for the application of the judicial mind and exercise of judicial discretion. It is unthinkable that an application, for example, for an order to enlarge or abridge time, amend pleadings and the like should be made by letter. Why then is it the case that so often applications for adjournment are made in this way? It may be said that such applications are made by letter because the hearing date is so imminent as not to permit of sufficient time to apply by summons. The reply to that is, in the first place competent practitioners will ensure that either no such applications are necessary or if requisite they will be made in such ample time as to enable them to be made in the normal way, that is by summons-in-chambers supported by affidavit speaking to the facts. To my mind late applications should as a matter of course be rare, based on circumstances beyond the control of the practitioner and his client and amounting to an emergency. In this event well can I understand such an application being made by letter or even telegram or telephone, depending on the urgency of the matter, see *Priddle v Fisher & Sons*,[3] and if this court is minded to allow the application it would convey its view to the practitioner or party concerned in the same way the application would have been made and ordinarily with the additional advice that counsel should appear on the hearing date and formally apply for an order for adjournment. Any complaint, I have heard one, that the requirement for counsel to appear so is costly demonstrates the levity with which these applications are treated. The complaint is, in my opinion, outweighed by the fact that in truth such occasions should be rare, the requirement acts as a deterrent to frivolous applications and is a safeguard against suspicion of favouritism and inconsistency on the part of the court. Trials and hearings are only in justice adjourned. Quite simply justice must be administered in open court for all to see, not by exchange of letters.

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I An application for adjournment of a trial or hearing is potentially insidious and a vehicle for abuse of the court's process. Its availability constitutes a temptation to the litigant, knowing that eventually he will have to come forward with what is claimed of him to seek to postpone the evil day, and to the practitioner to put off preparing his brief or take on yet another case.

Indeed the judge himself, and I speak entirely for myself, is also susceptible to human weakness. It may well cross his mind to yield to temporary relief before hearing yet another dreary old case, so to speak. In the end it is the unfortunate litigant, whether that person be languishing in gaol pending trial or awaiting payment of money long due or other remedy, who will continue to suffer; and the machinery of justice brought into contempt. Well is it said that justice delayed is justice denied.

It is the experience of this court that applications for adjournment are at times motivated by practitioners biting off more than they can chew; wanting to appear in more than one case at the same time but in different places. It may be that the time is ripe for busy counsel to brief out to able but less fortunate counsel, up and coming juniors for instance. That is a commendable course. It contributes to a wider cadre of competent counsel and the overall good of the litigating public. It may be argued that this suggestion will lead to a denial of a right to legal representation. I do not think the argument is a valid one. The right to legal representation by a person of the litigant's choice is premised on the availability of counsel's services.

The view I take is that it is unprofessional for counsel to undertake to appear in a case when reasonably he should know that he cannot do so. If in consequence the case has to be adjourned it will be an abuse of the court's process which he will have been privy to and that to my mind may well be prima facie a contempt of court inasmuch as it affects the fair administration of justice.

It may be pertinent to add here that there have been occasions when adjournments have been sought on the ground that counsel is committed to appear before the Supreme Court. To my mind adjournment on such a ground does not follow automatically. The Supreme Court sittings are published in the gazette well in advance. It seems to me that prudent counsel having a regular practice in the Supreme Court would rule out all sitting dates of that court when taking trial dates in other courts. In any event counsel should be able to ascertain from the Supreme Court Registry when cases in which they have been retained are likely to be listed for hearing and thus keep free the appropriate period.

Ultimately it boils down to good management and as usual it is only the incompetent who face judicial displeasure. What then is the position in this case?

The fact that there is no objection by any other party to these actions to the application for adjournment is by no means conclusive. It is to the court that the applicant has to look for indulgence. It is not so much a matter of indulgence but a sacrifice of judicial time and the time of the attendant court staff, disruption of the list and compounding the backlog of cases.

In this instance it seems to me that as soon as counsel discovered that he had been assigned to appear as counsel in the criminal trial he should have communicated with the learned senior assistant registrar, High Court, Johore Bahru, pointed out his present predicament regarding this trial and inquired whether or not suitable other counsel could be assigned to appear in the criminal trial in his place. Upon that inquiry if it was found that there

could not be a reassignment, counsel should have immediately taken steps with a view to assigning his brief in this case and if again in regard to this case he encountered difficulty briefing out he should, at the very least, have immediately, by telephone, informed the senior assistant registrar of this court of the situation. Thus as early as 29 January 1991 this court would have known the position and been able to arrange to utilize the three days set down for hearing of this case for cases wherein litigants have been long waiting determination of their grievances. Instead the solicitor concerned delayed till 20 February before writing to this court informing of the position. The only redeeming feature was the solicitor's candour in freely admitting to his default in this regard. It is bad enough that the solicitor concerned thought fit to write to the court only on 20 February — in fact he should have telephoned — he did not take steps to ensure that his letter reached the court in the quickest possible time. He did not think it fit to send the letter by express post or by courier. In the event the letter only reached the registry on 25 February. Worse still, the letter was copied only to the plaintiffs' solicitors. The solicitors for the first defendant were only informed on 27 February. The solicitor for the third defendant was informed on 1 March and Mr Tay, solicitor and counsel for the fourth defendant, only came to know of the adjournment when he attended the hearing of this case on 2 March. If that was not being inconsiderate, it is not known what is.

In any event once again the hearing of these actions will have to be adjourned. They are adjourned after due consideration of all the facts and circumstances and application of the case law above referred to. Without the services of counsel concerned — he is much experienced — his client stands to suffer. Seeing that counsel for the other parties have no objection, the person who will lose out is the litigating party seeking of this court redress. True, it is only one case that is being adjourned. The fact is it is yet another case that is being postponed, a practice which in the end has resulted in backlog. It is a veritable vicious circle.

With the concurrence of all counsel present, and all the litigants are this day represented by counsel, except counsel who has made the application for the adjournment, and again quite insensitively has not furnished free dates for the period for which the court is listing cases for hearing, I adjourn the cases for hearing on 12, 13, 14 and 15 October 1991. In regard to counsel's free dates, once more I have reason to record complaint. It is difficult, if not impossible, to predict when in court an occasion will arise when a matter will need to be adjourned for hearing or further hearing. In yesteryear it was considered bad practice for counsel to appear in court without being armed with his diary. Today the omission is a common event. Oblivious of the court's administrative burden counsel's dilemma when the occasion arises is often sought to be resolved by submitting that a date be fixed in futuro thus necessitating the registrar to spend valuable time liaising with the parties and persons within the court including the judge in order to obtain a date or dates suitable to all. Naturally the submission is rejected and that results in counsel, his junior or his instructing solicitor or the clerk scurrying to the nearest telephone to contact his chambers or

office to obtain free dates. The court then has to await the result of the call when the matter instead could easily have been resolved on the spot if counsel had his diary.

Counsel are assured that the intention of this court is not to be gratuitously difficult. Thus, for example, if counsel with the concurrence of other parties and well in advance seeks to have a trial adjourned and the trial dates to be vacated can be taken up by slotting in one or more other trials, there should be no reason for not accommodating counsel, provided counsel does not make a habit of taking this course. Again the court will exercise understanding in an appropriate case. For example, where a young practitioner, even an old one for that matter, ventures out on a new practice and finds himself confronted with two cases the trials of which clash in time, either of which such practitioner can ill afford to lose, this court will attempt to assist as best it can.

These matters have been addressed not with the view to taking practitioners to task. That is counterproductive and a negative attitude. In any event counsel's bona fide in this instance are in no way in question, but rather the matter is dealt with at length in order to identify the problem, resolve it and ensure that it does not recur. Thus those minded to apply for adjournment, at the drop of a hat so to speak, will think twice and hopefully cases, except in rare instances, will be heard at the time appointed for hearing and slowly but surely the backlog of cases will be reduced.

Application allowed.

Reported by Mathavan Devadas